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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PATRICK KIRK, Plaintiff and Respondent, v. FIRST AMERICAN TITLE INSURANCE COMPANY AND FIRST AMERICAN TITLE COMPANY, Defendants and Appellants.	B252238 (Los Angeles County Super. Ct. No. BC372797)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lee S. Edmon, Judge. Affirmed.

Dentons US LLP, Ronald D. Kent, Joel D. Siegel, Michael J. Duvall, Sonia Martin and David Simonton for Defendants and Appellants.

The Bernheim Law Firm, Steven J. Bernheim for Plaintiff and Respondent.

INTRODUCTION

In this class action, the trial court denied a motion to compel arbitration of claims of members of certain subclasses of persons who had utilized the escrow services of defendant First American Title Company (FATCO). FATCO filed this motion jointly with its parent, First American Title Insurance Company (FATIC). The trial court denied the motion, ruling that the moving papers failed to establish the existence of actual agreements to arbitrate with any members of the class. We affirm.

FACTS

Subsequent to the filing of the second amended complaint and on November 30, 2012, the trial court granted a motion for class certification, specifying certain subclasses of plaintiffs based, inter alia, on the types of fees charged by FATCO during the escrow process to these subclass members as purchasers of residential real estate. The complaint alleges, inter alia, that these charges were improper as they exceeded those which FATCO had filed with the California Department of Insurance (CDI) as required of it as an escrow company operating in the state of California. In June 2013, FATIC and FATCO filed their motion to obtain "an order compelling class members who are parties to owner's title insurance policies to submit their claims in arbitration on an individual, not [a] class or collective basis. . . ." The motion stated that "those class members agreed to arbitrate their disputes with [FATIC and FATCO]—including the claims asserted on their behalf in this case—on an individual basis. . . ." The arbitration clauses which FATCO claimed compel granting of this motion were contained in title insurance policies issued by FATIC to the subclass members who were new owners of the properties purchased utilizing escrow services provided by FATCO and to whom it is alleged FATCO charged the questioned fees. The moving parties sought to send the matter of the disputed charges to arbitration based on the terms of the arbitration clauses contained in four exemplar forms of title insurance policies issued by FATIC. The moving parties

acknowledged that FATIC allowed owners to opt-out of such arbitration clauses on request and without any fee.

The trial court denied the motion, ruling (1) FATIC had been dismissed after briefing and prior to argument, therefore only FATCO could proceed on the motion; (2) FATCO may assert a right to arbitrate under the title insurance policies as the complaint alleged that it is the alter ego of FATIC; (3) the motion is defective as it does not identify the members of the plaintiff subclasses as to whom it seeks to enforce an arbitration clause; and (4) FATCO's failure to meet the evidentiary burden which it has on this motion does not warrant revisiting the earlier order certifying the plaintiff class. This timely appeal followed.

CONTENTIONS

FATCO and FATIC make two principal contentions: (1) the trial court abused its discretion by compelling appellants to file their motion before they were prepared to do so and in preventing them from obtaining additional time, once the motion was heard, to obtain and introduce the evidence the court deemed necessary to the success of the motion to compel arbitration; and (2) the trial court incorrectly denied the motion based on moving parties' failure to establish the existence of the individual arbitration agreements between FATIC and members of the subclasses.

Before turning to address those claims, we consider whether FATIC is a proper party to this appeal.

DISCUSSION

FATIC as appellant[1]

Plaintiff filed a dismissal with prejudice of FATIC which was entered on July 10, 2013. However, rule 3.770(a) of the California Rules of Court, precludes entry of a dismissal of all or part of a class action without court approval. For this reason, at a

[1] Many of the facts in this section are taken from the parties' letter briefs in which we asked them to address the issue discussed in this section.

hearing on August 27, 2013, after discussion with all counsel, the trial court sua sponte vacated the dismissal. However, in the first sentence of its final ruling on the motion now appealed, the trial court stated "as Plaintiff dismissed FATIC as a defendant in this action, only FATCO remains in the action as a party who may bring this motion." The transcript of proceedings for the October 24, 2013 hearing on this motion does not contain any statement by counsel for any party reminding the trial court that it had set aside the dismissal and that, therefore, its predicate that FATIC was no longer a party, was in error.

In response to our letter inquiring about the status of FATIC as a proper party appellant, the parties agree that it remains a party, but otherwise disagree on the consequences of that fact. Plaintiff claims that FATIC lacks standing to appeal, but plaintiff did not appeal the trial court's determination that FATCO could pursue the motion as the alter ego of FATIC (an allegation plaintiff makes in his complaint). It is also clear from the fact that the motion was filed and argued by counsel who represents both FATCO and FATIC, and from the ruling, that the trial court would have decided the issues we now consider in the same way had it not (erroneously) concluded that FATIC was no longer a party. We therefore review the trial court's ruling as applying to both FATCO and FATIC, referring to the jointly made arguments as being made by "appellants" or by "moving parties."

Alleged arbitrary scheduling of motion and preclusion of introduction of evidence considered necessary to the motion

Appellants contend the trial court abused its discretion by ordering FATCO and FATIC to file their motion to compel arbitration " prematurely" and, when the motion was heard, by denying a continuance to obtain and introduce the evidence the court deemed necessary to the success of that motion.

Additional facts

The action had been filed on June 15, 2007. The five-year statutory deadline to bring this action to trial (Code Civ. Proc., § 583.310) was November 11, 2013 (giving effect to certain stays). Trial had been set for August 19, 2013, in advance of that deadline. Plaintiff had declined to waive this deadline (although he later did agree to a continuance, apparently because of administrative problems with the third party class administrator in providing proper notice to class members.

By April 2013, appellants had produced an "electronic list," generated from a company data base (known by the acronym FAST), of all potential class members. The FAST list contained information on 272,037 holders of owner's title insurance policies who comprised the potential class members, but it did not contain any record of which holders may have opted out of the arbitration clause otherwise part of each policy. Manual inspection of additional records was required to determine this fact.

On April 15, 2013, the trial court approved a plan for giving notice to these potential class members and also approved a third party class notice administrator to provide that notice and handle other administrative issues. The class notice process was delayed by administrative problems, with the result that the "opt-out" notice deadline was September 25, 2013.

At a May 23, 2013 hearing, the parties discussed with the trial court matters relating to the motion to compel arbitration, including the briefing schedule, and agreed on dates for the filing of briefs. Moving parties participated in the discussions and agreed to the final schedule. The record of proceedings of that date reveals that it was counsel for moving parties who had previously obtained, on their initiative, the original date for hearing of the motion, July 23, 2013, and that this date was the basis for the scheduling discussion. No citation to the record provided by appellants contains any discussion or suggestion that the trial court imposed this motion date on the moving parties.

The motion was filed on June 18, 2013, as the trial court had ordered based on the parties' agreement. On July 3, 2013, counsel for plaintiff filed an opposition in which he argued the motion was procedurally improper for its failure to specify the class members

as to whom it sought to compel arbitration, labeling the defects "mandatory prerequisites for bringing [the motion to compel arbitration]." The motion did not go forward on the original date. At a hearing in August 2013, the trial court agreed that the hearing on the motion to compel arbitration should be continued until after the opt-out deadline. A complete list of opt-out requests was filed on October 15, 2013; sixty (60) opt-out requests were received. (An additional 8,872 mailings were returned as not deliverable.)

The motion was heard on October 24, 2013, nine days after the conclusion of the opt-out period. During the hearing on the motion, counsel for appellants stated that it would take time to determine which of the members of the two subclasses had obtained endorsements to their title insurance policies removing the arbitration clause, and that it was "fairly simple" to produce the list "of every person who is subject to an arbitration agreement." After this representation, the trial judge stated, "As you can probably see from my tentative, my concern is I think you had the burden to do that in bringing the motion."

Related contentions and analysis

Appellants contend the actions of the trial court in (1) arbitrarily imposing the "early" scheduling of the motion to compel, (2) improperly requiring that the motion be filed before appellants had conducted the individual file reviews to determine which class members had opted out of the arbitration clause of their owner's title insurance policies, and (3) wrongly denying appellants' request, made at the hearing on their motion, for additional time to research and determine this information, each constitutes an abuse of discretion. In support of their contentions, moving parties argue that the identity of the actual parties to the arbitration agreement—here, the property owners who had not excluded the arbitration clause from their title insurance policies—was a necessary condition precedent to the filing of the motion as well as to a ruling on the motion. Appellants also dispute the timing of the October hearing, that it was held nine days after the close of the opt-out period, leaving moving parties "no opportunity" to produce the

list of class members who had excluded the arbitration clause from their title insurance coverage.

These arguments lack factual basis and otherwise are not convincing, for the following reasons.

1. The filing deadline for the motion

Appellants assert the trial court abused its discretion by requiring that their motion be filed by June 18, 2013. Appellants seek to support their contention by citations to the reporter's transcript. However, a fair reading of the transcript of trial court proceedings, including the proceedings held on May 23, 2013, cited by appellants, reveals that it was appellants who had scheduled the July date for the hearing of the motion to compel arbitration and that the dates set for filing the moving, opposing and reply briefs were agreed upon by all parties as part of a lengthy discussion of scheduling issues. The discussion on May 23 makes clear that these dates were keyed to the hearing date moving parties had obtained. Appellants do not cite, and we do not find any objection by their (or plaintiff's) counsel, to the June 18 deadline for filing of the motion in any portion of the record cited by appellants.

Appellants also appear to take out of context the trial court's statement upon which they seek to rely that "I am committed at this point to keep moving forward. . . ." In the balance of this sentence, the court states "and we will see where we are on July 19th." Thus, this is not a statement indicating abuse of discretion, but the contrary, a statement that the court will revisit matters in mid-July, on a date just after the then-expected hearing date on the subject motion. Thus, the claimed abuse of discretion is unsupported.

2. Preclusion of introduction of evidence

Appellants make several related claims regarding their contention that the trial court abused its discretion by not giving them more time after the close of the opt-out period to identify the members of the two subclasses who had obtained endorsements

deleting the arbitration clause from their FATIC title insurance policies. We determine that there is a factual flaw in this contention and, in any event, that the trial court did not abuse its discretion in denying the request for continuance, if it was made.[2]

The opt-out period procedures finally terminated on October 15, nine days prior to the October 24, 2013 date to which the motion to compel arbitration had been continued. Appellants argue that the trial judge committed an abuse of discretion by not then giving them time to conduct the file review that was necessarily to identify those subclass members who had obtained the arbitration waiver endorsements. In support of this claim, appellants first argue that the motion was premature at any time prior to the close of the opt-out period, stating, inter alia: ". . . the expiration of the class-notice and opt-out periods was obviously an indispensible prerequisite to identifying the individual class members who were subject to an arbitration agreement." On this basis they next argue that the trial court should have granted their motion for additional time to identify those class members who had obtained the arbitration waiver endorsements.

The fact that appellants' counsel themselves obtained the original hearing date on the motion to compel arbitration at a time when they knew that the class notices were only then in the process of being mailed, and thus initiated the timing with respect to the motion, is sufficient to defeat the first basis for their motion. Appellants clearly knew the character of, and defects in, the FAST list they had generated but nevertheless obtained the July hearing date and agreed to the briefing schedule for that date. Thus, they were aware of the claimed defect at all relevant times, yet now assert error on the part of the court. Had there been any dispute about the need for the arbitration clause endorsement information appellants now claimed required a further continuance, that issue was known to moving parties from the outset. Further, the same issue had been raised by plaintiff's counsel, including in his written opposition to the motion, filed on July 3, 2013. It had

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[2] Denial of a request for continuance to supplement a motion is reviewed for abuse of discretion. (See *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 15-18.)

also been articulated by the trial court at the May 2013 hearing at which filing deadlines for the original hearing date on appellants' motion had been established.

In addition, the record of proceedings at the October 24, 2013 hearing does not contain any express request by appellants' counsel for a continuance. In their opening brief on appeal moving parties cite particular pages of the reporter's transcript in support of their contention that they made such a motion, which motion was denied. What counsel for appellants state at the cited pages is that now that the opt-out period is closed, they "can now produce a list of every person subject to an arbitration agreement." Nowhere in the record citations upon which they rely do they articulate a motion to continue the hearing so the list can be prepared. They have therefore waived this argument.

Moreover, in response to the statement by appellants' counsel that they "now" can make the investigation to determine which subclass members obtained endorsements deleting the arbitration provision from their title insurance policies, the court states, "As you can probably see from my tentative, my concern is I think you had the burden to do that in bringing the motion." After comment by counsel for moving parties (which he describes as "push back" to this statement by the court), the trial court expands on its statements: "But you did bring a motion to compel arbitration before the class was defined. That's the whole point. . . ." Given the five-year trial deadline that was imminent, as well as the trial date which was extant at the time moving parties obtained their motion date (then in August 2013; later continued), they had the time from the class ruling in November 2012, or from their production of the FAST list by April 2013, or as of the date they obtained the July hearing date for the subject motion, to conduct the file review which, in October 2013, they sought additional time to commence. While the record indicates that appellants' counsel were concerned with not doing the work only to have potential class members opt-out, the record also indicates that only 60 persons did so; thus, this was not a significant unnecessary burden. On this record, we find no abuse of discretion by the trial court in denying the inferential motion for a further continuance of the hearing on the motion.

Requiring appellants to provide sufficient evidence of individual arbitration agreements

Appellants also contend the trial court wrongly denied the motion by requiring them as the moving parties to prove the existence of individual arbitration agreements. In support of their motion, appellants had offered exemplars of four title insurance policies in use during all or part of the time period at issue in the action, an exemplar of the form of exclusion of the arbitration clause from the form title insurance policies, and exemplars of the rules of the arbitral bodies referenced in the policy exemplars.[3] We review this ruling de novo as it presents a question of law, viz,. what is required as evidence in support of a motion to compel arbitration. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 451-452; *Gorlach v. Sports Club Co*. (2012) 209 Cal.App.4th 1497, 1505; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71; *Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973.) Plaintiff had argued in the opposition he filed on July 3, 2013 that the motion was deficient for this reason.

Referencing the plaintiff's opposition to the motion, the trial court pointed out that an action to compel arbitration is a suit in equity to compel specific performance of a contract and thus the burden was on moving parties to establish the written agreements to arbitrate and their terms, citing *Spear v. California State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 and *City of Hope v. Bryan Cave* (2002) 102 Cal.App.4th 1356, 1369 (see also Code Civ. Proc., § 1281.2, requiring a finding "that an *agreement* to arbitrate the controversy *exists*" [emphasis added]). The trial court found that appellants did not do this, reasoning that identifying exemplar agreements was not sufficient for them to prevail on the motion "because FATCO has failed to identify any counterparties to any identifiable agreements." As the trial court also wrote in its order denying the motion:

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[3] These rules are incorporated into the individual arbitration clauses of the policies. (*Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC* (2012) 212 Cal.App.4th 539, 545-547; *SWAB Financial v. E* Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1201.)

"Here, FATCO seeks specific performance of hundreds of thousands of arbitration agreements without identifying a single person who has an obligation to perform under any contract. But, to prevail in a claim on a contract, FATCO must establish 'the existence of a contract [and] its terms which establish the obligation in issue. . . .' FATCO may have established that various insurance policies existed in the abstract, but it has failed to identify any counterparties to any identifiable agreements. Without such information, it is impossible to determine who had a contractual obligation that must specifically [be] performed and the motion must be denied." An accompanying footnote contains further explanation of the trial court's reasoning: "An agreement is not the same as a form. An agreement requires exactly what the term suggests, two or more parties who agree to something—here to arbitrate disputes. FATCO has identified four forms that likely were the basis for countless actual agreements. But FATCO has not marshaled any evidence of an actual agreement."

Appellants contend they were not required to introduce any actual agreement to arbitrate (as opposed to the claimed exemplars of the *types* of agreements in use during the time period at issue) in order to prevail on their motion, citing *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 (*Condee*) [mere allegation of the existence of an arbitration agreement not sufficient to shift burden of proof on the existence of arbitration agreement]. Appellants overlook that *Condee* has been "limited to its facts." Eight years after *Condee*, in *Toal v. Tardif* (2009) 178 Cal.App.4th 1208 (*Toal*), a different division of the same Court of Appeal limited that ruling. The *Toal* court, citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 (*Rosenthal*) and *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [controlling and supervening power of Supreme Court decisions]), held that the evidentiary standard explicated in *Rosenthal* must prevail, stating, "To the extent *Condee* conflicts with *Rosenthal*, our Supreme Court's decision is controlling [citations omitted]." (*Ibid.*) In *Rosenthal, supra*, our Supreme Court held that, to prevail on a motion to compel arbitration, the moving party must submit "prima facie evidence of a written agreement to arbitrate the controversy [and] the court itself must determine

whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable." (*Rosenthal*, *supra*, 14 Cal.4th at p. 413.)

Appellants' reliance on *City of Hope v Bryan Cave, L.L.P*. (2002) 102 Cal.App.4th 1356, 1369 (*City of Hope*), is also misplaced. In order to establish standing to arbitrate, which was at issue in *City of Hope* (the demand for arbitration had been filed by a claimed third party beneficiary), Division 7 of this court held that the parties seeking arbitration must "demonstrate that the promises [in the contract sought to be enforced] *applied to them personally*." (*Id.* at p. 1369, emphasis added.) That proof requires the specificity the trial judge in the present case determined was absent. Thus, as a matter of law, the motion to compel was deficient.

Other grounds

Appellants also contend that the trial court's order cannot be affirmed on any other basis, listing several contentions in summary form. As we affirm the trial court's ruling for the reasons set out above, we do not consider other contentions made on appeal.

DISPOSITION

The order is affirmed. Plaintiff shall recover his costs on appeal.

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GOODMAN, J.*

We concur:

TURNER, P.J. MOSK, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.